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See Concurring Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROMELIA TREJO et al., Plaintiffs and Respondents, v. CARL SCHOU et al., Defendants and Appellants.	E070872 (Super.Ct.No. CIVDS1514885) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Donald R. Alvarez, and Gilbert G. Ochoa, Judges.* Reversed.

The Annigian Firm and Jason D. Annigian for Defendants and Appellants.

The Law Offices of Marc E. Grossman, Marc E. Grossman, Joseph J. Wangler, and Nicholas Luciano-Corona for Plaintiffs and Respondents.

* Judge Tomberlin ordered service by publication. Judge Alvarez entered the default judgment. Judge Ochoa denied the motion to vacate the default judgment.

The trial court refused to vacate a significant default judgment, finding the motion to vacate untimely. We will reverse. We will hold that the motion was not untimely because the judgment is void, not merely voidable, due to defective service by publication.

I

PROCEDURAL BACKGROUND

A. *Proceedings in the Original Case*.

The facts in this section are taken from the evidence admitted in connection with the motion to vacate.

This action was filed on October 30, 2000.

The complaint alleged that, while Richard Ortiz was attending a rave at Laser Daze in Victorville, Eddie Rodriguez, Omar Rodriguez, Rafael Rodriguez and Chris Barrios stabbed him to death. It further alleged that "defendants" "negligently carelessly and improperly owned, operated, managed, maintained and controlled [the] rave location . . . ." (Capitalization altered.)

The named plaintiffs are the decedent's mother, Romelia Trejo, and his wife, Gloria Ortiz (individually and as guardian ad litem for his daughters, Ariana Esperanza Ortiz and Gia Rose Ortiz) (collectively the Ortizes).

The four alleged killers are named as defendants, along with Carl Schou and Nellie Schou (individually and doing business as Laser Daze), an entity called Cyberkid, and an entity called Judgment Family.

The complaint asserted causes of action for wrongful death, premises liability, and negligence. It sought $5 million in damages on each cause of action.

On May 24, 2001, the Ortizes filed an amended complaint. This time, it sought $5 million in damages solely on the cause of action for premises liability.

On July 10, 2001, the Ortizes filed an application for service by publication on the Schous.[1] The application was signed, under penalty of perjury, by Edward Acosta, who was a licensed private investigator. It incorporated by reference a letter by Steven Figueroa. The letter, however, was not properly signed under penalty of perjury.[2]

In his letter, Figueroa recounted his efforts to serve all of the defendants. Regarding the Schous, he stated that their business address at 15378 Ramona in Victorville, formerly Laser Daze, was vacant. Nevertheless, he made four attempts to serve them there. City and county records for Laser Daze showed a residence address at 14476 Hercules in Hesperia. Thus, he made four attempts to serve the Schous at 14476 Hercules. The first time, a neighbor told him they had moved. The fourth time, a resident likewise told him they had moved. He mailed a letter to the Schous at 14476 Hercules, requesting address correction, but he never heard back from the post office.

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[1] Actually, they filed two applications for service by publication — one for the Schous and one for Cyberkid and Judgment Family. The only application in the record is the one for Cyberkid and Judgment Family. It appears, however, that the two applications were otherwise identical. Certainly the Ortizes have never argued otherwise.

[2] It began, "I declare under the penalty of perjury . . . ." However, it did not state, as required, that it was signed in California or that it was signed under penalty of perjury under the laws of California. (See Code Civ. Proc., § 2015.5.)

The trial court ordered service on the Schous by publication. Accordingly, a copy of the summons was published on August 2, 9, 16, and 23, 2001.[3]

On March 7, 2002, counsel for the Ortizes filed a declaration stating that he had discovered the Schous' address, and he had mailed a copy of the summons and complaint to the Schous at 10359 Maple Avenue, Hesperia, CA 92345.

Also on March 7, 2002, the Ortizes requested the entry of the Schous' default on the original (not the amended) complaint. The request was mailed to the Schous at:

"Carl Shou

"Nellie Shou

"10359 Mapple Avenue

"Hesperia, CA 92345."

The trial court entered the default as requested.

An April 22, 2002, the trial court held a default prove-up hearing. It found that Romelia Trejo had proved damages totaling $296,032.45 and Gloria Ortiz had proved damages totaling $1 million.

On June 5, 2002, the trial court entered a default judgment, in favor of the Ortizes but not against any particular defendant, for $1,507,143. This included prejudgment interest at 12 percent.

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[3] A statement of damages was also served by publication. However, it was addressed only to Cyberkid and Judgment Family, not to the Schous.

On October 4, 2005, the trial court entered an amended default judgment for $1,507,143. This time, it was specifically against "Carl Shou" and Nellie Shou." In addition to prejudgment interest at 12 percent, it also provided for postjudgment interest to accrue at a rate of 12 percent.

The Schous had once lived at 14476 Hercules, but in 1998, they sold it and bought a home at a different address in Victorville. Thus, their current address had been ascertainable at all times from San Bernardino County property records. They denied any connection to the 10359 Maple or "Mapple" address.

B. *Proceedings in This Case*.

On September 28, 2015, the Ortizes filed an application to renew the default judgment. It was assigned a new case number. The trial court duly renewed the default judgment.

According to the Schous, they first became aware of the judgment on February 21, 2018, when they were trying to sell their business and the escrow company discovered an abstract of judgment. They "immediately" obtained counsel.

On March 22, 2018, the Schous filed a motion to vacate the default and the default judgment, invoking both Code of Civil Procedure section 473, subdivision (d) and the court's equitable powers. They argued that:

1. The service by publication was not valid, because:

    a. The application was not signed by counsel for the Ortizes.

    b. The Ortizes did not show reasonable diligence.

c. The Figueroa letter was not under penalty of perjury.

d. The Figueroa letter was false, in that it was dated June 9, 2001, yet it stated that he had attempted service on June 12, 2001.

e. The application was not accompanied by a declaration that a cause of action existed.

2. The default was not valid, because:

a. The request for entry of default was untimely.

b. The default was requested and entered on the original complaint, even though an amended complaint had been filed.

c. Both the original complaint and the amended complaint improperly included damages allegations.

3. The judgment was not valid, because:

a. It awarded an improper rate of interest.

b. At the prove-up hearing, the trial court awarded $16,032.45 in special damages, but the judgment awarded $16,052 in special damages.

c. The amended judgment misspelled the Schous' name.

They introduced evidence to show that they had a meritorious defense: They had rented Laser Daze to their son. Their son, in turn, rented it to third parties, who were in control of the premises when Ortiz died. They had no knowledge of the alleged rave.

They also had no knowledge of any previous violent incidents at Laser Daze. Before the hearing, the Schous also lodged a proposed answer.

On April 16, 2018, the Ortizes filed an opposition. Their memorandum of points and authorities argued that the Schous "were well aware of the lawsuit but avoided being served." (Capitalization altered.) However, it stated facts that were not supported by any declaration; it also attached documents that were not authenticated. Moreover, it was not signed by the Ortizes' attorney.

According to the memorandum, on or before January 9, 2000 — i.e., nine months before this action was filed — the Ortizes' attorney wrote to the Schous,[4] asking them to identify their insurance carrier. They responded, saying that they had no insurance. They gave their address as P.O. Box 402249 in Hesperia.

The opposition included a declaration of Steven Figueroa, stating that he attempted to serve the Schous at "the stated addresses several times . . . ." However, the Figueroa declaration, too, was unsigned.

In their reply, the Schous duly objected to the memorandum, the documents, and the declaration.

One day before the motion was set to be heard, the Ortizes substituted in new counsel (the firm now representing them on appeal). As a result, the hearing was continued.

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[4] He did not say what address he wrote to.

On June 11, 2018, after hearing argument, the trial court corrected the amount of special damages in the judgment. Otherwise, it denied the motion.

It found that the Schous had acted diligently. It further found that they had introduced evidence of a meritorious defense. However, it ruled that:

1. The judgment was merely voidable, not void, and therefore the motion to vacate was untimely.

2. There was no evidence of extrinsic fraud or mistake.[5]

II

THE MOTION TO VACATE WAS NOT UNTIMELY BECAUSE THE JUDGMENT ROLL SHOWED THAT THE DEFAULT JUDGMENT WAS VOID

Under Code of Civil Procedure section 473, subdivision (d), "[t]he court may, ... on motion of either party after notice to the other party, set aside any void judgment or order."

"'[A] judgment that is void on the face of the record is subject to either direct or collateral attack at any time. [Citations.]' [Citation.]" (*Gassner v. Stasa* (2018) 30 Cal.App.5th 346, 356.) "A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment-roll. [Citation.]" (*Morgan v.*

[5] The Ortizes had not raised either of these arguments in their opposition.

Clapp (1929) 207 Cal. 221, 224; accord, *F.E.V. v. City of Anaheim* (2017) 15 Cal.App.5th 462, 471.)[6]

By contrast, "[w]here a party moves under section 473, subdivision (d) to set aside 'a judgment that, though valid on its face, is void for lack of proper service, the courts have adopted by analogy the statutory period for relief from a default judgment' provided by section 473.5, that is, the two-year outer limit. [Citations.]" (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180, and cases cited; accord, *Thompson v. Cook* (1942) 20 Cal.2d 564, 569.)[7]

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[6] The Schous argue that a void judgment can be set aside at any time, regardless of whether it is valid on its face or void on its face; they cite *Rockefeller Technology Investments* (*Asia*) *VII v. Changzhou Sinotype Technology Co., Ltd.* (2018) 24 Cal.App.5th 115, 135-137 (*Rockefeller*). As they note only belatedly, in their reply brief, the Supreme Court has granted review in *Rockefeller*. (*Rockefeller Technology Investments (Asia) VII v. Changzhou Sinotype Technology Co.* (Sept. 26, 2018, S249923) 426 P.3d 303.) Hence, *Rockefeller* may be cited, but it "has no binding or precedential effect . . . " (Cal. Rules of Court, rule 8.1115(e)(1).)

[7] "However, to the rule just stated there is a well established exception which provides that although the judgment or order is valid on its face, if the party in favor of whom the judgment or order runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, then it is the duty of the court of declare the judgment or order void." (*Thompson v. Cook*, *supra*, 20 Cal.2d at p. 569; accord, *OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1328-1329.) This is true even if the two-year time limit has run. (*Thompson v. Cook*, *supra*, 20 Cal.2d at p. 571.)

Because we will conclude that the default judgment was void on its face, we need not discuss whether the trial court erroneously failed to consider facts that the Ortizes admitted or that the Schous introduced without objection.

When the defendant has defaulted, the judgment roll consists of "the summons, with the affidavit or proof of service; the complaint; the request for entry of default with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; if defendant has appeared by demurrer, and the demurrer has been overruled, then notice of the overruling thereof served on defendant's attorney, together with proof of the service; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons." (Code Civ. Proc., § 670, subd. (a).)

Here, then, the judgment roll included (1) the original and amended complaints, (2) the application for service by publication, (3) the order for service by publication, (4) the proof of service by publication, (5) the request for entry of default, and (6) the default judgment.

"A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending [1] that the party to be served cannot with reasonable diligence be served in another manner specified in this article, and [2] that," subject to exceptions not relevant here, "[a] cause of action exists against the party upon whom service is to be made or he or she is a necessary or proper party to the action." (Code Civ. Proc., § 415.50, subds. (a) & (a)(1).)

When "any defect in service must appear on the face of the judgment-roll . . . , our review of a trial court's order finding such a facial defect is of necessity de novo. [Citation.]" (*Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1440.)

Logically, the same is true of an order, like the one here, apparently finding no facial defect.

The judgment roll, standing alone, showed that the default judgment was void, for two reasons.

First, the judgment roll showed that the affidavit in support of service by publication failed to show reasonable diligence.

"Consistent with the notions of fair play and due process, substituted service by publication is 'a last resort' when 'reasonable diligence to locate a person in order to give him notice before resorting to the fictional notice afforded by publication' has been exercised. [Citation.]" (*Calvert v. Al Binali* (2018) 29 Cal.App.5th 954, 963.)

"An order for publication of summons, based solely upon a finding that the defendant 'cannot after due diligence be found within this state,' is void when the affidavit which constituted the evidence in support of that finding does not contain any evidence tending to prove any diligent effort to find the defendant. In the attempt to make such service the quality of diligence must be present . . . . 'A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment-roll. [Citation.] It follows, therefore, that, if the affidavit upon which the order directing publication of summons was had in this action fails, as urged by the appellant, to comply with the provisions of section [415.50] of the Code of Civil Procedure, the default judgment thereafter entered on such defective service would be void on its face,

and the trial court at any time could . . . properly set it aside.' [Citation.]" (*Narum v. Cheatham* (1932) 127 Cal.App. 505, 507.)

For example, in *Olvera v. Olvera* (1991) 232 Cal.App.3d 32, the affidavit in support of the application for service by publication stated that the defendant (the plaintiffs' son's ex-wife Paula) no longer lived or worked in Riverside and "'cannot be found.'" (*Id*. at pp. 35-36.) They "'believe[d] that she may receive her mail [through] relatives in Pismo Beach.'" (*Id*. at p. 35.) They also stated that they had received a letter from her, "'but there was no/personal return address . . . .'" (*Ibid*.) The defendant moved to set aside the ensuing default judgment; she offered new evidence, including that the plaintiffs' son was in contact with her and knew where she was living. (*Id*. at pp. 37-38.) The trial court granted the motion under Code of Civil Procedure section 473.5 (lack of actual notice). (*Olvera v. Olvera*, *supra*, at p. 38.)

We upheld the trial court's order under Code of Civil Procedure section 473.5. (*Olvera v. Olvera*, *supra*, 232 Cal.App.3d at pp. 39-41.) However, we also held, alternatively, that the order for publication was void, because the supporting affidavit was inadequate. (*Id*. at pp. 41-43.) "It affirmatively discloses that plaintiffs had received a letter from Paula; the assertion that the letter contained no 'personal' return address virtually demands some explanation of the reason why the return address which *was* given was not considered helpful. Although plaintiffs admitted knowing Paula's general whereabouts, there was no indication that they had employed any of the usual means to find her. [Citation.] Finally, plaintiffs did not allege that they had employed either a

private process server or the appropriate governmental officer authorized to serve process in the Pismo Beach area to attempt personal service." (*Id*. at p. 42.) We admonished that, when notice is required by due process, "' . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' [Citation.]" (*Id*. at p. 43.)

Here, the application for publication was supported solely by the unsworn Figueroa letter. For that reason alone, it was inadequate. (Evid. Code, § 1200 [hearsay rule].)

Even if we were to consider the Figueroa letter, it merely showed that he had attempted service at two addresses associated with Laser Daze. It did not show that he had made any effort to locate the Schous *apart from* their connection to Laser Daze. For example, he did not consult a telephone directory or Google (which did exist in 2001). A resident and a neighbor told him that the Schous had moved, but he did not claim he asked them where the Schous had moved to. He did not check public records to determine whether the Schous owned any other business. Most grievously, he did not consult real property records. (See Judicial Council of Cal., com., 14B Pt. 1 West's Ann. Code Civ. Proc. (2016 ed.) foll. § 415.50 [reasonable diligence includes "investigation of . . . the real and personal property index in the assessor's office, near the defendant's last known location"].) Although they were not required to do so (*Calvert v. Al Binali*, *supra*, 29 Cal.App.5th at p. 964), the Schous introduced evidence that this would have led right to them. In sum, there was no substantial evidence of reasonable diligence.

The judgment roll also showed that the default judgment was void for a second reason: There was no affidavit stating facts showing that "[a] cause of action exists against the party upon whom service is to be made . . . ." (Code Civ. Proc., § 415.50, subds. (a) & (a)(1).) There was a space for this on the form application, but it was left blank. The original complaint and the first amended complaint were both unverified, and thus could not satisfy this requirement. (Cf. *Hurt v. Haering* (1922) 190 Cal. 198, 199-200.)

"For the purpose of service by publication, the existence of a cause of action is a jurisdictional fact. [Citations.] 'An affidavit in proper form . . . is a jurisdictional basis of the order for publication: "[T]here must be an affidavit containing a statement of some fact which would be legal evidence, having some appreciable tendency to make the jurisdictional fact appear, for the Judge to act upon before he has any jurisdiction to make the order. Unless the affidavit contains some such evidence tending to establish every material jurisdictional fact, the Judge has no legal authority to be satisfied, and, if he makes the order, he acts without jurisdiction, and all proceedings based upon it are void. [Citations.]"' [Citation.]" (*Harris v. Cavasso* (1977) 68 Cal.App.3d 723, 726-727; accord, *Olvera v. Olvera*, *supra*, 232 Cal.App.3d 32, 42, fn. 9.)

The efforts of the Ortizes' former counsel to obtain a default judgment were slovenly, at best — plagued by careless and unprofessional mistakes. However, the inadequacy of the affidavit in support of service by publication, standing alone, is more

than sufficient to require reversal. We therefore do not discuss the other procedural defects asserted by the Schous.

III

THE DEATH OF ROMELIA TREJO

On an unknown date — but sometime before the trial court ruled on the motion to vacate — plaintiff and respondent Romelia Trejo died. We ordered counsel for plaintiffs and respondents to file a motion to substitute her successor in interest. He declined to do so, asserting, "We do not have anyone to act as successor in interest . . . ." Thus, we consider the effect, if any, of Trejo's death on this appeal.

"As a general proposition, . . . judgment cannot be rendered for or against a decedent, nor for or against a personal representative of a decedent's estate until the representative has been made a party by substitution. [Citations.] A long line of cases has therefore allowed direct attack upon a judgment obtained without substitution of a personal representative after a party has died. [Citations.]" (*Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 956-957.)

"[I]f a person dies before an action is brought, he is never a party to the action. Therefore, any judgment therein as to him is void. [Citations.]" (*Lundblade v. Phoenix* (1963) 213 Cal.App.2d 108, 112.) However, "where a party dies subsequent to the commencement of the action and after the court has acquired personal jurisdiction over him, the entry of judgment against him is a 'mere irregularity' which renders the

judgment voidable only and therefore immune from collateral attack. [Citations.]" (*Woolley v. Seijo* (1964) 224 Cal.App.2d 615, 620-621.)

"'[T]he death of a party pending suit does not oust the jurisdiction of the court, and hence . . . the judgment is voidable only, not void. This does not mean that a judgment can be really rendered for or against a dead man, but that it can be rendered nominally for or against him, as representing his heirs, or other successors, who are the real parties intended.' [Citations.]" (*Collison v. Thomas* (1961) 55 Cal.2d 490, 495-496; accord, *Todhunter v. Klemmer* (1901) 134 Cal. 60, 63.)

We have indubitable jurisdiction to enter a judgment in this appeal that is binding on the plaintiffs and respondents *other than* Trejo. Under the foregoing principles, it would seem that we can also enter a judgment as to Trejo, which would be binding on her successor in interest and immune from collateral attack. However, we need not definitively decide this issue; in our disposition, we will leave it to be resolved on remand.

IV

DISPOSITION

The judgment is reversed. The trial court is directed to grant the motion to vacate. It is further directed to determine the identity of Trejo's successor and to order the successor substituted into the action. (Code Civ. Proc., § 377.41.) Thereafter, it must give the successor a time-limited opportunity to file a motion asserting that our opinion is not binding on the successor and therefore the judgment should be reinstated solely as to

the successor. As a practical matter, the successor may choose not to do so; for example, the successor may accept that, under the reasoning in this opinion, the judgment in Trejo's favor is likewise void, so that any new motion to vacate would necessarily be granted. The Schous are awarded costs on appeal against the Ortizes.

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RAMIREZ
P. J.

I concur:

FIELDS
J.

[*People v. Trejo*, E070872]

Slough, J., Concurring.

I agree with the majority's legal analysis and join their opinion in full. However, I write separately to explain why I would refuse to award appellants their costs on appeal.

It's true "the party prevailing in the Court of Appeal in a civil case . . . is entitled to costs on appeal." (Cal. Rules of Court, rule 8.278(a)(1).) However, the same rule that creates the entitlement recognizes the court's discretion to deny the award, or even award costs to the non-prevailing party, in the proper circumstances. "In the interests of justice, the Court of Appeal may also award or deny costs as it deems proper." (Cal. Rules of Court, rule 8.278(a)(5).)

If any case calls out for us to exercise our discretion, it is this one. The plaintiffs brought suit seeking redress for the wrongful death of their son, husband, and father. In attempting to serve the defendants (now appellants) with the complaint, their former attorney's efforts were, in the words of the majority opinion, "plagued by careless and unprofessional mistakes." (Maj. opn. *ante*, at p. 14.) Plaintiffs ended up with a default judgment they could not defend based on technical errors of their legal assistants that have nothing to do with the merits of the case. In short, the plaintiffs were poorly served by their attorney, and it cost them.

It strikes me as unfair to make them responsible for appellants' costs on appeal when they got here through no fault of their own, trying only to obtain partial and

necessarily inadequate redress for the grievous loss of their family member. We have the power in this small way to express our recognition of the unfairness, and I would take the opportunity to do so.

SLOUGH
J.